STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
45 Fremont Street
San Francisco, CA 94105

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TITLE 10. INVESTMENTS
CHAPTER 5. INSURANCE COMMISSIONER
Article 7.1
TITLE INSURANCE STATISTICAL PLAN
AND RELATED RULES GOVERNING RATES AND CHARGES

Summary and Response to Common Comments

COMMENTS CONCERNING AUTHORITY, CONSISTENCY AND NECESSITY ("A.1, A.2,…ETC.")

A.1: Common Comments:

- The Commissioner lacks authority to promulgate rate regulations without the use of data from a statistical plan.
- The Commissioner's findings concerning competition must be based upon data collected through a statistical plan.

Response:

To the extent that this comment suggests that the Commissioner is required to promulgate a statistical plan that encompasses every aspect of the Commissioner's rate regulatory formulae, this comment misinterprets applicable law. Insurance Code section 12401.5, which represents the statutory authority for the statistical plan, expressly provides that the Commissioner "may" prescribe rules and regulations "as a further aid to uniform administration of rate regulatory laws." This provision is discretionary rather than mandatory, and provides the Commissioner with the flexibility needed to identify the kinds of data that are useful in the uniform administration of rate regulatory laws. At the same time, in drafting section 12401.5, the Legislature recognized that other regulatory findings may not benefit meaningfully from the data collected through a statistical plan and therefore could be made without the need for data from the statistical plan. The Commissioner's decision to promulgate regulations that rely upon information generated from sources other than a statistical plan was appropriate and within the Commissioner's authority.

Moreover, applicable law does not require the Commissioner to base his market competition findings on data collected through a statistical plan. Insurance Code section 12401.3, which requires the Commissioner to determine whether a reasonable degree of competition exists, sets forth no standards by which this determination must be made. In fact, as explained above, the Legislature described the statistical plan as one tool of many that the Commissioner "may" use "as a further aid" in the administration of rate regulation within the state.

A.2: Common Comments:

- Proposition 103, which provides the Commissioner with prior approval authority over some lines of insurance, does not apply to the business of title insurance.

- The proposed regulations assume the Commissioner has prior-approval authority over title rates, as he has under Proposition 103. He does not have that authority over title insurance, which specifies a file-and-use system.

Response:

The Commissioner rejects this comment. The Commissioner has not relied upon the provisions of Proposition 103 as authority for the proposed regulations. He relies on the applicable provisions of the Insurance Code, and not on Proposition 103, for the proposed regulations. To the extent the commenter is referring to the Commissioner's citation of Supreme Court cases arising under Proposition 103, in particular *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, the Commissioner's reliance is limited to general constitutional and administrative-law principles governing rate-regulation and construction of common terminology (such as "excessive" and "inadequate").

The commenter fails to acknowledge that, with respect to the Commissioner's power to specify by formula a maximum rate, Proposition 103 (including specifically Ins. Code, § 1861.05) and the statutes governing title insurance (including specifically Ins. Code, § 12401.3) are not dissimilar. The text of Proposition 103 does not expressly authorize the Commissioner to determine whether a rate was excessive by formula – in fact, Proposition 103 does not even expressly authorize the Commissioner to adopt regulations to implement the measure. Yet the Supreme Court found the authority to adopt regulations, including specification of a formula to determine whether a rate is excessive, to be implied. (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216.) The Commissioner certainly has the same power to implement the same statutory term, "excessive" – particularly since, unlike Proposition 103, Insurance Code section 12401.5 expressly authorizes the Commissioner to "prescribe by reasonable rules and regulations" a statistical plan, "for use in reviewing and evaluating individual rate filings" under Insurance Code section 12401.3.

Moreover, the comment confuses procedure with substance. The procedure provided by the Insurance Code for regulation of rates is, indeed, file-and-use, and that is what the proposed regulations implement. But under either prior-approval or file-and-use, the substantive standards for regulation, prohibiting excessive rates, is the same. In either case, when the Commissioner reviews a rate, he or she must do so in a manner that allows the regulated firm the opportunity to cover its reasonable costs and to earn a fair return. That is what the proposed regulations seek to do, to identify the reasonable costs of providing title insurance and escrow services and a reasonable profit level. So the proposed regulations follow the procedures of file-and-use and employ a cost-based substantive standard that is wholly appropriate for title insurance under the Insurance Code.

A.3: Common Comments:

The proposed regulations violate Insurance Code section 12401 because the regulations seek to "fix and determine a rate level by classification or otherwise.
The proposed regulations violate Insurance Code section 12401.5(d)(3) because the regulations seek to "Fix, determine, or in any way impair competitive rating or the free market."

Response

The Commissioner rejects this comment. The proposed regulations do not "fix" or "determine" rate levels. They define the level above which the rate is excessive. Companies are free to compete by charging any rate they wish so long as the rate is not "excessive." (Ins. Code § 12401.3.) It has long been understood that the code authorizes the Commissioner to prohibit excessive rates and that doing so does not constitute the proscribed fixing or determination of rates.

A.4: Common Comments:

Ins. Code § 12401.5(d) says no statistical plan, and no regulations pertaining to the statistical plan, shall "[f]ix, determine, or in any way impair competitive rating or the free market." These regulations do that.

Response:

The Commissioner rejects this comment. The proposed regulations do not "fix" or "determine" rates. Those words describe regulatory regimes where the regulator specifies the rate that must be charged, as is done in several states. The proposed regulations specify a maximum and permit companies to charge any rate that does not exceed the maximum. That preserves both "competitive rating" and, to the extent it otherwise exists, a "free market." The regulations merely limit competition within the range of rates that are not excessive.

A.5 Common Comments:

- In implementing Insurance Code sections 12401.3 and 12401.5, the Commissioner cannot "in any way impair competitive rating or the free market" (Ins. Code § 12401.5(d)(3)). These proposed regulations do that.

- The regulations violate Insurance Code section 12401, which reflects "the express intent of this article to permit and encourage competition between persons or entities engaged in the business of title insurance."

Response:

The Commissioner rejects this comment. The proposed regulations expressly permit and encourage price competition ("competitive rating") by permitting companies to charge any rate they wish so long as the rate is not excessive. The Commissioner does not accept the view implied in this comment that the ability to charge an excessive rate is essential to, or part of, a properly functioning competitive market. If the Legislature was of the view that competitive rating, competition, or the free market requires that companies be allowed to charge excessive rates, it would not have prohibited rates that are excessive (§ 12401.3(a)) and would not have authorized the Commissioner to terminate the use of excessive rates.

A.6 Common Comments:

Insurance Code section 12401 expressly denies the Commissioner "power to fix or determine a rate level by classification."

Response:

The Commissioner rejects this comment. To "fix or determine" a rate level is to prescribe the specific rate to be charged, as is done in some states. These regulations do not do that. These regulations allow companies to fix and determine their own rate levels, so long as the rate is not excessive. The code expressly authorizes the Commissioner to prohibit excessive rates, so a regulation that defines and prohibits such rates cannot be the proscribed fixing or determining of rates.

A.7 Common Comments:

Assuming, for the sake of argument, that the proposed regulations are not "fix[ing]" rates through the regulatory formula, the proposed regulations are still "deterimin[ing] rates." That's separately prohibited.

Response:

The Commissioner rejects this comment. Whatever the difference between "fix" and "determine," neither is being done in the proposed regulations. To the extent the regulations address classification issues, they at most specify maxima; they do not specify mandatory rates to be charged.

A.8 Common Comments:

The variables in the various formulas stated in the proposed regulations are classifications, and the specification of values for those variables constitutes the determination of a rate level by classification.

Response:

The Commissioner rejects this comment. The variables in the formula do not constitute the determination of rate levels since no company is required to charge a number produced by any of the formulae. So to the extent the proposed regulations employ "classifications," their use is permissible because what is proscribed by statute is the fixing or determining rates by classification, not the recognition of different risk categories.

Furthermore, many of the distinctions drawn in the regulations are not classifications but the recognition of different products being sold. Plainly the determination whether a rate is excessive will properly take into account the product being sold.
Also, the proposed regulations (§ 2359.3) specifically allow for companies to introduce new policy forms, endorsements, and other services, discounts and surcharges.

A.9 Common Comments:

- Each company is entitled, under the Due Process Clause, to an individualized determination whether its rates are excessive.
- Title insurers must have the right to challenge the finding of "no competition" in an individualized adjudicative hearing.

Response:

The Commissioner rejects this comment. Regulation by formula based on industry-average costs has long been practiced by regulatory agencies and approved by the courts. That includes applying numerical values adopted in regulations to individual companies' hearings without giving those companies the opportunity to adjudicate the values. (See, e.g., *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216.)

Moreover, the commenter incorrectly assumes there will be no hearing on a rate that exceeds the interim maximum. A company that fails to bring its rate down to the required level would receive a notice of noncompliance and, if it requested a hearing, would receive one. To the extent that the commenter contends that due process requires that companies be given an opportunity to relitigate the Commissioner's formulaic regulatory definition of 'excessive,' the Commissioner rejects this comment. The effect of the 'relitigation bar' is simply to assure that, in determining whether an individual insurer's rates are excessive, the administrative law judge does not entertain the question whether the premises underlying the rate regulations are sound. (See *20th Century v.*

Garamendi (1994) 8 Cal.4th 216, 312.) This provision is appropriate and does not deprive companies of due process.

To the extent that this comment suggests that the finding of no competition must be made through the adjudicative process, the comment is rejected. The finding of no competition is distinct from the finding of excessiveness. (For example, two companies may be operating in the same market, so the competitive conditions will be the same, but only one of them may be charging excessive rates.) Nothing in the Insurance Code requires that the finding of market-condition be made in an adjudicatory hearing, and the commenter has cited no authority to that effect. The finding of the absence of competition is inherently better suited to rulemaking than to adjudication, since the finding is industry-wide and adjudication would be wasteful and could lead to inconsistent findings.

A.10 Common Comments:

- Companies are entitled, under the Due Process Clause, to a hearing on whether the end result of applying the regulations to them is to effect a confiscation.
- The regulations should provide for a variance procedure to reflect the unique circumstances of individual insurers.

Response:

A rate adjustment is necessary where the law in question creates a sufficient risk of a confiscatory result. In this case, the adjustment is contained in the regulations themselves, which recognize reasonable expenses and provide for a reasonable profit. Under such conditions, there is no constitutional need for any further adjustment. As the Supreme Court indicated in *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 313, a properly constituted regulatory formula has the end-result "'safety' built in," and therefore does not require any other "safety valves."

A.11 Common Comments:

Even the Commissioner's Proposition 103 regulations allow for an individualized end-result hearing (§ 2646.6). These regulations don't even do that.

Response:

The Commissioner rejects this comment. As the Supreme Court indicated in *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 313, a properly constituted regulatory formula has the end-result "'safety' built in," and therefore does not require any other "safety valves."

A.12 Common Comments:

The Commissioner is required to make the statistical plan uniform with other states' statistical plans. The regulations are not reasonable because they require additional/different reporting than other states or the National Conference of Insurance Legislators.

Response:

The Commissioner rejects this comment. The commenter has conflated two different statutory references to uniformity. The regulations, as the commenter notes, are adopted to serve as an "aid to uniform administration of rate regulatory laws of this state." (Ins. Code, § 12401.5.) The second use of the word, in subdivision (d), says that the Commissioner "may give due consideration to the rating systems in use and, in order that the plan may be as uniform as is practicable among the several states." It is this second use of the word "uniform" that leads the commenter to conclude that the statistical plan seeks uniformity "with other states." But the reference to uniformity with other states is wholly discretionary with the Commissioner, as denoted by the word "may" and the reference to "due consideration." The Commissioner has examined data maintained by members of this industry, including data filed with the Department and data obtained in two data calls, and has concluded that uniformity with other states is not practicable and would be deleterious to the administration of California laws.

The Commissioner has determined that the statistical plan is reasonable and does not conflict with the intent of Insurance Code section 12401.5. The reporting of details regarding each company's operations is required because the Commissioner has determined that existing reporting is inadequate. The Commissioner has considered the rating systems employed in other states and found them to be inadequate to California's needs. In part, those needs are identified in the calculations prescribed in the proposed regulations. The needs are further informed by the inadequacies of current reporting and the inadequacies of companies' responses to two data calls promulgated in part to assess the reasonableness of rates. In addition, the other states' rating systems do not provide sufficient information to facilitate examination and auditing of companies' data.

A.13 Common Comments:

- The proposed regulations fail to give consideration to "past and prospective loss experience within and outside of this state."
- The regulations do not give consideration to "a reasonable margin for profit and contingencies."
- The regulations do not give consideration to the fact that a given title entity's expense provisions may differ from those of other title entities due to the operating methods unique to individual companies.

Response:

The Commissioner rejects this comment. The proposed regulations are based, to the extent applicable, precisely on the industry's average costs, which are calculated from industry-wide loss experience. The profit factor in the regulatory formulas explicitly provides a reasonable margin for profit and contingencies.

A.14 Common Comments:

- The proposed regulations represent an unconstitutional taking because they will appropriate property for public use without just compensation.
- The proposed regulations are unconstitutional because they will deprive property owners of property without due process.

Response:

The Commissioner rejects this comment. There has been no "appropriation" of any property, and the commenter has failed to make a coherent showing to the contrary. With respect to the right to just compensation, that right is fully satisfied by rates that permit the regulated entity to cover its reasonable expenses and the opportunity to earn a fair profit. (E.g., *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 251, 253, 258, 293.) The regulations do precisely that.

A.15 Common Comments:

The proposed regulations will force licensees to bring their rates and charges similar to the maximum rate formulae. This, in turn, will subject the regulated business entities to anti-trust liability for conforming their rates and chares to those required by the regulations.

Response:

The Commissioner rejects this comment. The commenter has proffered no authority for this proposition, which is well-understood to be false. At least since *Parker v. Brown* (1943) 317 U.S. 341, it has been clear that state action does not create antitrust liability. (See, e.g., *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 47 ["The Sherman Antitrust Act is inapplicable to state action."]; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 664.)

COMMENTS CONCERNING COMPETITION OR THE COMPETITION REPORT ("C.1, C.2,…ETC.")

C.1 Common Comments:

The proposed regulation improperly assumes that the only relevant form of competition is price-competition. That is not correct. In addition to competing on the basis of price, title companies compete for business by offering superior service. By reducing and restricting the amount companies have to serve their customers, the Commissioner is eliminating an important form of competition.

Response:

The Commissioner rejects this comment. Article 5.5, governing rate filing and rate regulation, specifies the absence of competition as a condition of the Commissioner's authority to regulate rates. It follows from that fact that the "competition" the Legislature was referring to was price-competition.

Furthermore, the Commissioner rejects the implied premise that non-price competition serves consumers' interests in this market. On the contrary, the available evidence indicates that the high marketing costs observed in the title markets reflect competition for referrals by realtors, lenders, and builders, on whom title companies lavish inducements in expectation that the recipient will steer more business their way. There is no evidence such "competition" serves consumer interests at all.

C.2 Common Comments:

The Competition Report states that "price competition" is the only relevant form of competition. That's not true. These companies compete fiercely, less on the basis of price than of service. That's "competition" just as surely as price-competition is "competition," and the Commissioner cannot say there's no "competition" when there is plenty of service-competition, which the Report ignores.

Response:

The Commissioner rejects this comment. The inquiry into competition is dictated by Insurance Code section 12401.3, which says the Commissioner must make a finding of no-reasonable-degree-of-competition before he may find a rate excessive. The fact that the finding is a precondition to <u>rate</u> regulation strongly indicates the Legislature's intent that the finding be pertinent to the existence or absence of price-competition.
The fact that there is not a reasonable degree of price-competition means that the competitive market cannot be relied upon to provide reasonable prices, triggering the need for rate-regulation. Accordingly, Birnbaum's focus on price-competition is entirely appropriate.

C.3 Common Comments:

If you drive prices down ignoring service competition, inevitably service will suffer, title and escrow will take longer, people will not be able to close on time, there will be more errors and consumers will be harmed.

Response:

The Commissioner rejects this comment. Commenter has provided no evidence to

support the claim that service will suffer and no evidence to support the claim that any reduction in service is significant or sufficient to justify higher prices.
There has been no showing that the sums expended for sales provide any benefit to the consumer.

C.4 Common Comments:

Insurance Code section 12401.3(a) refers to "the services provided," making it inappropriate to make a finding on competition without reference to non-price, service competition.

Response:

The Commissioner rejects this comment. The reference to "services" is in clause (1) of the second paragraph of subdivision (a), which pertains not to competition but to the reasonableness of the rate. It says that a rate shall not be held to be excessive unless it "is unreasonably high for the insurance or other services provided." The proposed regulations address this requirement by calculating separate maxima for rates for title and escrow, for home-sale versus refinancing, and for preliminary title versus title policy.

C.5 Common Comments:

Automation has not lowered costs. Rather it has improved the product.

Response:

The Commissioner rejects this comment. The Commissioner believes automation has lowered the cost of providing title search, examination, underwriting and policy production. It is clear that far less time is needed to search a title history when the records are available almost instantaneously on a computer than from searching through paper records. It is clear that far less time is needed to produce a title policy when the policy is printed from a software template than from typing in individual information into a paper form. The problem is that the savings from automation have not been received by consumers in reduced prices, but have been passed on to the referrers of title business through additional services, as described by escrow company representatives at the August 30 hearing and in their written testimony.

C.6 Common Comments:

The Competition Report's analysis of the product market is deeply flawed by failing to recognize two different title-insurance products: title policies on home sales and title policies on refinancings.

Response:

The Commissioner rejects this argument. A title search or title insurance policy is for a purchase transaction is not a separate product or product market than a title search or title insurance policy for a non-purchase refinance transaction. The activities involved in each are essentially the same with the purchase transaction typically having an additional party or parties involved in the transaction. The market structure and market dynamics are also the same for purchase and non-purchase refinance transactions in that the market is characterized by reverse competition in which the underwritten title company and title insurance company market to the referrers of business instead of to the ultimate consumer who pays for the product.

C.7 Common Comments:

Ignoring the separate product market for refinancing allowed the Competition Report's author to completely ignore the evidence of robust price-competition for refis.

Response:

The Commissioner rejects this comment. Commenters have pointed to alleged rate reductions for refinance transactions as evidence of both a different market for non-purchase refinance than purchase transactions and of price competition in the non-purchase refinance "market." The Commissioner finds that few or no substantial rate reductions have actually occurred and that rate reductions have been limited to extremely specialized circumstances for which few consumers qualify. There is no evidence that rates reflect the reasonable costs associated with providing the service and product, either in testimony presented in this regulatory proceeding or in rate filings submitted to the Department.

C.8 Common Comments:

The Competition Report draws improper conclusions from the differences between northern and southern California escrow rates. To the extent rates are higher in the south, it is because the independent escrow industry provides greater service than the companies writing in northern California.

Response:

The Commissioner rejects this comment. Despite repeated requests to representatives of independent escrow companies and underwritten title companies, no evidence has been presented to support the claim that independent escrow companies provide greater escrow services in Southern California than underwritten title companies providing escrow service in Northern California. Moreover, the Commissioner has found that almost all the independent escrow companies operate in only six Southern California counties, while prices in other Southern California counties where independent escrow companies do not operate are also much greater than in Northern California. In addition to the lack of empirical facts supporting this comment, economic theory also refutes this argument. If consumers are willing to pay higher prices for alleged additional services, then consumers in Northern California would be just as willing as those in Southern California. Or that some consumers in Southern California would seek lower escrow costs for fewer services. Yet neither outcome has occurred over a lengthy period of time. The Competition Report cites a study from 25 years ago that found the same disparity in escrow pricing between Northern and Southern California. If escrow markets were competitive, economic theory suggests that prices and services would have migrated from one region to the other over time. The fact that escrow prices in Southern California are double those in Northern California -- even in Southern California counties where few or no independent escrow companies operate is powerful evidence of the lack of reasonable competition in California escrow markets. Finally, economic theory suggests that there should be more price competition when there are more market participants selling a product. Yet, the presence of several hundred additional providers of escrow service in six Southern California counties -- compared to dozens in the most populous northern California counties -- has not resulted in price reductions for escrow services in those Southern California counties or in prices that match those in other counties where independent escrow companies do not operate.

C.9 Common Comments:

There’s no surprise that there is little competition in small counties. There is not enough business to support more robust competition.

Response:

To the extent it is offered to argue against regulation, the Commissioner rejects this comment. This comment confirms the absence of a reasonable degree of competition and the need for rate-regulation.

C.10 Common Comments:

“Reverse competition” is not a recognized term in economic theory.

Response:

The Commissioner rejects this comment. "Reverse competition" is a well-established concept in insurance economics and has been used to describe the market structure of title insurance and credit insurance markets for at least 30 years. The term has been used, in reference to title insurance, for nearly 30 years, apparently first having been coined by the 1977 Department of Justice study. Since then, it was repeated in several other studies, including the Peat Marwick report for HUD and the California Insurance Commissioner’s Bulletin 80-12. The term has been codified in regulations, including the New York State credit insurance regulation and has been used and defined in work products of the National Association of Insurance Commissioners. The time has past when the industry could credibly object to the phrase “reverse competition.”

C.11 Common Comments:

The fact is that most consumers look to their real-estate agent or lender for advice on selection of a title company, and that is not likely to change for the foreseeable future.

Response:

The Commissioner rejects this comment. This comment confirms the absence of price-competition and the need for regulation. Moreover, the comment mischaracterizes reverse competition. Reverse competition does not refer to consumers seeking advice of third parties; it refers to a market structure in which the seller markets the product to a third party who refers the paying customer to the seller, the consequence of which is that the referrer of the business has the market power and is able to extract considerations from the seller who passes the cost of the considerations onto the paying consumer who has no market power to discipline the pricing of the seller.

C.12 Common Comments:

Many businesses market to intermediaries who steer ultimate consumers to their product (e.g., drug companies marketing to doctors to get consumers to purchase their drugs.

Response:

The Commissioner rejects this comment. Marketing to intermediaries is not itself a problem so long as there is some source of price-competition. For example, in the drug industry, the upward pressure on price that may derive from marketing to physicians is offset by the intervention of third-party payers, such as insurers, who limit prices and availability of drugs.

It is worth noting that pharmaceutical companies have increasingly turned to direct-marketing to consumers, so the exclusive reliance of title insurers on marketing to intermediaries is an increasingly rare phenomenon.

Ultimately, it may well be that there are other markets where intermediary-marketing produces excessive prices. The existence of such examples is no ground for abiding excessive prices in the business of title insurance, where the Legislature has seen fit to outlaw excessive rates and to empower the Commissioner to take action where competition fails to protect consumers.

C.13 Common Comments:

- Numerous studies have shown that direct-marketing to consumers would not be effective in this industry.
- The proposed regulations incorrectly assume that consumers do not benefit from the marketing of title to intermediaries. In fact, consumers often do not have time

> to educate themselves and instead rely upon the judgment of intermediaries to make an informed decision about title insurance products. This process is beneficial to consumers.

Response:

The Commissioner rejects this comment. Doubts about the feasibility or effectiveness of direct-marketing militate in favor of regulations to regulate prices in this industry.
To the extent that this comment suggests that consumers benefit from marketing to intermediaries, the Commissioner disagrees. The comment makes the facile assumption that because consumers need information, they get it at reasonable cost and under reasonable conditions from intermediaries. And neither this comment nor the comments it cites refute the finding of the Competition Report that there is no price-competition in the relevant markets.

C.14 Common Comments:

- The Commissioner has provided no study to demonstrate whether direct marketing would produce lower prices.
- Studies suggest that direct marketing would not be effective and might actually produce higher costs than those present in the current market.

Response:

Doubts about the feasibility or effectiveness of direct-marketing militate in favor of regulations to regulate prices in this industry.

C.15 Common Comments:

Birnbaum's reliance on the Fidelity v. Mercury litigation and similar cases is misplaced. Such disputes are common in every industry. In this industry, the disputes simply show the dominance of non-price competition.

Response:

The Commissioner rejects this comments. Documents from the Fidelity-Mercury litigation were cited as evidence of reverse competition by showing that title insurers and underwritten title companies view the referrers of business as their customers as opposed to the consumer who actually pays for the product. In addition, the litigation over the "stealing" of sales personnel appears to be much more pronounced in the title industry than elsewhere and underscores the importance of reverse-competition in this industry. The litigation has exposed enormous inducements companies pay for people who can steer business their way, confirming that title costs reflect unreasonably high sales costs. In recent months, juries have found title companies guilty of unfair recruitment and awarded multi-million dollar damage awards in Gateway v. DiChiaccio and in Security

Title v Linda Pope. In the latter, the jury awarded Security Title damages of over $40 million against First American.

C.16 Common Comments:

Herfindahl-Hirschman Index (HHI) scores are an outdated and method for assessing competition and should not be relied upon as an indication of competition.

Response:

The Commissioner rejects this comment. HHI continues to be the standard measure of market concentration. The federal Department of Justice, the Federal Trade Commission, and the National Association of Attorneys General all continue to use HHI measurements in their analysis of horizontal mergers. In addition, Birnbaum used the HHI as only one indicator of competition and market structure, among several others.

C.17 Common Comments:

HHI is not an important measure of market concentration where, as here, there is easy entry.

Response:

The Commissioner rejects this comment. HHI is not only an important measure of market concentration, it is the most well accepted measure of market concentration, having replaced four- and eight-firm market shares. The Commissioner also rejects the claim of easy entry into title insurance markets. The competition report found few title insurer entries and, because of mergers and acquisitions, a reduction in the number of title insurance groups over the past ten years. The competition report also found few new underwritten title companies entering the market, that new entries were uniformly affiliated business arrangements that added no new capacity to the system and many acquisitions of independent underwritten title companies by national title insurance groups with the overall result that the number of underwritten title companies has decreased and the market share of the top underwritten title companies affiliated with national title insurance groups has increased over the past ten years.

C.18 Common Comments:

The Competition Report fails to consider other factors than HHI, as the antitrust-enforcement agencies now do.

Response:

The Commissioner rejects this comment. The comment is factually incorrect. The competition report considered several other factors besides market concentration, including entries and exits, pricing, profits and the prevalence of illegal kickbacks and other indicia of reverse competition. Moreover, the enforcement agencies use HHI to define the degree of competition. Under their standards, the California title-insurance markets are all highly concentrated, justifying heightened scrutiny of mergers – the issue that most often calls for their review. When they contemplate a merger, they consider whether the proposed transaction would create efficiencies or otherwise provide benefits to offset the harm to competition. Those questions are irrelevant here, where no acquisition has been proposed and thus no such "benefits" are at issue. In this case the market already is highly concentrated, justifying regulatory action to provide the pricing-discipline competition does not provide.

C.19 Common Comments:

Established business relationships are no barrier to entry.

Response:

The Commissioner rejects this comment. The commenter has provided no evidence that controlled business relationships are not a barrier to entry. To the contrary, numerous studies have concluded that they are. For example, the Department of Justice study found that existing law inadequately dealt with the anti-competitive effects of controlled business arrangements. The evidence indicates that established business relationships with entities in the position to refer title and escrow business is a barrier to entry. Such evidence includes the fact that virtually every underwritten title entry in the past six years has been an affiliated business arrangement with an entity with established business relationships. Other evidence includes the prevalence of expensive "recruitment" of key title and escrow personnel from competitors who bring large blocks of business when they switch companies.

C.20 Common Comments:

If there is any "barrier to entry," it is the burdensome licensing requirements imposed by CDI.

Response:

The Commissioner rejects this comment. The state imposes licensing requirements to protect the public. To the extent that potential entrants cannot satisfy those requirements, their exclusion from the market is entirely appropriate. But to the extent that such appropriate limitation on entry reduces competition that would otherwise be present, the need for that reduction is further reason to rely on regulation, rather than competition, to ensure reasonable prices.

C.21 Common Comments:

The monoline restriction is not a barrier to entry. It is an important restriction.

Response:

The Commissioner rejects this comment, which is a non-sequitur. The monoline restriction may well be justified as a consumer-protection measure intended to avoid solvency-risks to title insurers, but that does not mean the restriction is not a barrier to entry. It cannot be seriously contended that rules excluding insurers and other financial-services companies from the title business is not a barrier to entry.

C.22 Common Comments:

There have been numerous entries and exits in recent years (firms and offices).

Response:

The Commissioner rejects this comment. The competition report found few title insurer entries and, because of mergers and acquisitions, a reduction in the number of title insurance groups over the past ten years. The competition report also found few new underwritten title companies entering the market, that new entries were uniformly affiliated business arrangements that added no new capacity to the system and many acquisitions of independent underwritten title companies by national title insurance groups with the overall result that the number of underwritten title companies has decreased and the market share of the top underwritten title companies affiliated with national title insurance groups has increased over the past ten years.

Moreover, the commenter has failed to provide any evidence that the entries noted in this industry provide any new source of price-competition. The largest number of entries and exists are found among independent escrow companies. However, the Commissioner has found that the largest independent escrow companies -- those with the greatest number of branch offices -- are, in fact, affiliated with title insurance companies or other entities in the position to refer business to underwritten title companies or title insurance companies. Most important, the evidence suggests that most entries are existing firms that offer no price-competition. Despite hundreds of independent escrow companies operating in six Southern California counties, escrow prices in those counties remain essentially the same as escrow prices in other Southern California counties where escrow service is provided by a small number of underwritten title companies and twice the prices in Northern California where escrow services are provided by a fewer than three dozen underwritten title companies even in the most populous county.

Many of the new entries turn out to be controlled business arrangements, such as realtors forming an alliance with title insurers to facilitate the payment of high fees for steering business. The observation of market-exits is likewise unpersuasive. Many of the exits were, in fact, buy-outs of existing firms to eliminate competition, often by paying very high amounts to take over the seller’s business. The commenter has offered no evidence that the observed market exits reflect increased competition – or even that they do not reflect reduced competition.

C.23 Common Comments:

- The Competition Report claims the title industry has excessive profits. In fact, title companies have lower returns on equity than the Dow, the S&P, and other industries.
- The Competition Report concedes that the Department currently lacks sufficient information to determine insurer profitability.

Response:

The Commissioner rejects this argument. First, the comment is factually incorrect. The profitability cited -- return on equity -- for underwritten title companies and title insurers was generally greater than returns available from an investment in the S&P 500. Moreover, the comparison is inappropriate because the proper measure comparison is not what other industries have earned, but what the reasonable rate of return was an industry subject to rate regulation. During the period studied, the reasonable after-tax rate of return that would have been used in establishing reasonable rates for title insurance would have been in the range of 10% to 12% -- far less than the returns earned by title insurers and underwritten title companies and, consequently, indicating excess profitability of title insurers and underwritten title companies. In addition, the reported profitability of title insurers and underwritten title companies greatly understates the profitability of the title and escrow industry for several reasons. First, many owners of underwritten title companies take profit as salary, bonus or commission, which reduces the stated profitability by turning profit into an expense. Second, there are many affiliate transactions among underwritten title companies, title insurance companies and other affiliates, some of which result in double-counting of expenses, some of which reflect profit reported as an expense, such as a management fee, and some of which are inflated expenses for services provided. Third, and most important, profitability, understood as the difference between revenue and the reasonable cost of providing a service is greatly understated because title insurers and underwritten title companies spend the bulk of what would otherwise be profit on expenditures that benefit the referrers of title and escrow business. This "profit" is spent on illegal kickbacks as well as legal expenditures that provide no benefit to the consumer paying for the product, but greatly benefit the real estate agents, mortgage brokers, lenders and homebuilders who are in the position to refer business to title insurance companies and underwritten title companies. The evidence of such expenditures is found in the captive reinsurance schemes under which title insurance companies rebated almost half of the title insurance premium to homebuilders and in the very large percentage of personnel costs devoted to sales, marketing and consumer support, where consumer support is the industry term used to describe free services to those entities considered "customers" by title insurance companies and underwritten title companies -- namely, real estate agents, mortgage brokers, lenders and homebuilders.

C.24 Common Comments:

Many companies have higher returns than the 12%-18% ROEs of the title insurers: Glaxo (49%), Kinetic (193%), Dell (60%), P&G (45%), Colgate (100%), Avon (119%). Whole industries, such as accounting (67%) and legal services (101%) make vastly more than title companies.

Response:

The Commissioner rejects this argument. First, the comment is factually incorrect. The profitability cited -- return on equity -- for underwritten title companies and title insurers was generally greater than returns available from an investment in the S&P 500. Moreover, the comparison is inappropriate because the proper measure comparison is not what other industries have earned, but what the reasonable rate of return was an industry subject to rate regulation. During the period studied, the reasonable after-tax rate of return that would have been used in establishing reasonable rates for title insurance would have been in the range of 10% to 12% -- far less than the returns earned by title insurers and underwritten title companies and, consequently, indicating excess profitability of title insurers and underwritten title companies. In addition, the reported profitability of title insurers and underwritten title companies greatly understates the profitability of the title and escrow industry for several reasons. First, many owners of underwritten title companies take profit as salary, bonus or commission, which reduces the stated profitability by turning profit into an expense. Second, there are many affiliate transactions among underwritten title companies, title insurance companies and other affiliates, some of which result in double-counting of expenses, some of which reflect profit reported as an expense, such as a management fee, and some of which are inflated expenses for services provided. Third, and most important, profitability, understood as the difference between revenue and the reasonable cost of providing a service is greatly understated because title insurers and underwritten title companies spend the bulk of what would otherwise be profit on expenditures that benefit the referrers of title and escrow business. This "profit" is spent on illegal kickbacks as well as legal expenditures that provide no benefit to the consumer paying for the product, but greatly benefit the real estate agents, mortgage brokers, lenders and homebuilders who are in the position to refer business to title insurance companies and underwritten title companies. The evidence of such expenditures is found in the captive reinsurance schemes under which title insurance companies rebated almost half of the title insurance premium to homebuilders and in the very large percentage of personnel costs devoted to sales, marketing and consumer support, where consumer support is the industry term used to describe free services to those entities considered "customers" by title insurance companies and underwritten title companies -- namely, real estate agents, mortgage brokers, lenders and homebuilders.

C.25 Common Comments:

- From 1980 to 1990, title insurers averaged a meager 6% ROE – below risk-free returns. Obviously the unusually profitable recent years are unrepresentative of the long-term profitability of the industry.

- The two-year data sample derived from the competition report is not a sufficient sample size from which to ascertain the reasonableness of title insurer profits. The two-year sample represents the peak of a 15-year economic cycle.

Response:

The Commissioner rejects this comment. The industry profitability for the 1980's is inapplicable for several reasons. First, investors do not look to returns from twenty years ago to judge the profitability of an industry today. Recent profitability is clearly a better indication of the prospects for an industry. Second, the results of the 1980's were skewed by unique events related to the Savings & Loan scandals, including devastated real estate markets in many states and historically unprecedented losses resulting from S&L fraud. Third, the premise behind is the comment is flawed and unreasonable. The premise is that title insurers and investors are willing to accept low profitability in some years because it will even out with high profitability in other years, somehow averaging out over a real estate cycle. This is illogical because title insurers and investors have no idea how long a real estate cycle will take or how high or deep the cycle will go. It is empirically incorrect because title insurance companies do not explain low profitability as a planned event for which they will recover with high profitability a few years down the road. Rather, the national title insurance groups are publicly-traded companies who, like other publicly-traded companies, must deliver profitable results quarter after quarter.

C.26 Common Comments:

UTCs [32.3%] are less profitable than the accounting (67%) and legal-services (101%) industries.

Response:

The Commissioner rejects this comment. The fact that there may be other industries experiencing even higher returns on equity does not refute the fact that UTC profits are excessive and super-competitive. Moreover, the appropriate comparison is not to other industries, but to the reasonable rate of return that would be used in establishing a reasonable rate under rate regulation. In addition, even the high stated profitability is understated for several reasons as set out in Comment C23.

C.27 Common Comments:

The Competition Report improperly focuses on ROE. Title insurers' returns on revenue, operating profits are very low – much lower than comparable industries.

Response:

The Commissioner rejects this comment. Returns on equity are the established measure for rate-regulation, not only in the insurance industry (as in the Proposition 103 regulations) but also, for example, in utility regulation. Return on revenue can be distorted as, for example, when the company reports as “expenses” payments made to affiliates and owners that are really disguised profits.

C.28 Common Comments:

A 1998 refinance escrow fee on a $500,000 loan would have been $680. Today the fee is $250. If there is no competition, why would escrow fees go down 37%?

Response:

The Commissioner rejects this comment. First, it is unclear that the cited rates are correct or would apply to more than a few consumers under extremely selective circumstances. Second, the appropriate comparison would be the fee paid on the $500,000 home in 1998 to the fee paid on the same home at the much-higher transaction amount today. Precisely such calculations were made and are reported in the Staff Report on Interim Rates, which showed that rates rose with skyrocketing housing prices far faster than costs would justify.

C.29 Common Comments:

This is an intensively competitive business. During the late 1980s/early 1990s, title companies were unable to raise rates when profitability was slim because of competition. Ticor and Safeco merged to remain competitive. Chicago Title which acquired Ticor and Safeco later merged with Fidelity National for similar reasons.

Response:

The Commissioner rejects this comment. Mergers and acquisitions are not necessarily evidence of a pre-merger competitive market. Market consolidation is generally a matter of concern that merger and acquisition activity has eliminated competition. The Commissioner does not view the consolidations cited by the commenter to be evidence of a competitive market today.

C.30 Common Comments:

- If rates are driven down, there will be fewer competitors, less competition, and higher prices.
- The regulations will interfere with competition and the free market by forcing fewer employees to handle the same functions due to layoffs. This, consequently, will result in a reduction in the quality of service provided to consumers.

Response:

The Commissioner rejects this comment. The claim is unsupported that there will be fewer competitors when all are required to charge rates that are not excessive but that give each the opportunity to cover its reasonable costs and to earn a fair return.

But even if one credits this prediction, it is no different an effect than would obtain in a competitive market. Were there price-competition, rates would be driven to non-excessive levels. To the extent there may be companies that cannot survive charge non-excessive rates, the free market would weed them out.

Moreover, the commenter has confused reduction in revenues and job-losses with interference with the free market. The Commissioner expects any diminution in industry employment due to the proposed regulations to be more than offset by the favorable effects on employment in other industries from consumers having more money to spend – particularly at a time when many of the affected consumers are meeting the needs of new homes or are taking equity out of their homes to meet other needs.

C.31 Common Comments:

It would be detrimental to consumers to have title companies come and leave as the market rises and falls.

Response:
The Commissioner rejects this comment. That is exactly what one would expect from a competitive market. The solution is proper solvency regulation. The solution is not to allow companies to charge super-competitive rates.

C.32 Common Comments:

If rates are driven down, companies will go out of business, leaving consumers with nobody to pay their claims.

Response:

The Commissioner rejects this comment. State law provides for solvency regulation that protects against title-insurer defaults.

C.33 Common Comment:

The proposed regulations will do unnecessary harm to the free market.

Response:

The Commissioner rejects this comment. The regulations are premised on the finding that there is not a reasonable degree of competition. Where there is not a reasonably competitive market, exclusive reliance on a "free market" to avoid excessive rates is not warranted.

C.34 Common Comment:

- **The regulatory finding of no competition is not capable of review or reconsideration, to take into account changes in the California market.**

Response:

The Commissioner rejects this comment. The commenter incorrectly assumes that the finding cannot be modified in response to changes in market conditions. The Commissioner may decide to amend the regulation in the future (a decision that might be informed by the data provided in the statistical plan), and any member of the public may, at any time, petition the Commissioner to adopt such an amendment and support the petition with whatever information that person may choose to present.

COMMENTS CONCERNING ESCROW COMPANIES ("E.1, E.2,...ETC.")

E.1 Common Comments:

- By regulating controlled escrow companies, the Commissioner is illegally regulating independent escrow companies.
- Independent escrow companies are exclusively regulated by the Department of Corporations and the Department of Real Estate, so the effects of the proposed regulations on independent escrow companies infringes on those departments' jurisdiction.

Response:

The Commissioner rejects this comment. The Insurance Code clearly contemplates the regulation of controlled escrow companies, implicitly recognizing and accepting any incidental effects on independent escrow companies and their regulation by the Department of Corporations.
The Commissioner does not claim the authority to regulate the rates of independent escrow companies, and the proposed regulations do not purport to exercise any such regulatory authority.

E.2 Common Comments:

Independent escrow companies are audited and regulated better by DOC than controlled escrow companies are regulated by CDI.

Response:

The Commissioner rejects this comment. This comment is not specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action, so no response is necessary. (Gov. Code, § 11346.9, subd. (a)(3).)

E.3 Common Comments:

Realtors and loan agents do business with the same escrow company because they get reliable, high-quality service.

Response:

The Commissioner rejects this comment. The commenter offers no evidence that realtors do not serve their own self-interest when they steer consumers to a given escrow company. The Birnbaum study, the DOJ study, and the Peat Marwick study for HUD, among others, indicate that real estate and loan agents often place their own financial interests ahead of those of the consumer.

E.4 Common Comments:

Escrow companies are constantly forced to upgrade computer equipment and software in order to do more work with fewer people. Thus, the stress level has increased substantially over the last 10 years. This reduction in fees would place undue stress on an already over-worked work force.

Response:

The Commissioner rejects this comment. Commenter offers no evidence that computerization of escrow functions, with reduction in staffing made possible by computerization, places any undue stress on employees, nor that such employees were over-worked before automation of escrow functions.
Since employee costs are, in general, set by the proposed regulations at the industry-average costs, there is no basis for claiming that rates allowing recovery of those costs would be unreasonable.

E.5 Common Comments:

Commissioner's regulations fail to appreciate the function of escrow companies in the real estate transaction.

Response:

The Commissioner rejects this comment. This comment is not specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action, so no response is necessary. (Gov. Code, § 11346.9, subd. (a)(3).)

E.6 Common Comments:

While interim rate reduction would decrease income for escrows "temporarily", there is no certainty as to how temporary this interim reduction will remain in place. This, despite the fact that inflation and other costs will continue to rise.

Response:

The Commissioner rejects this comment. It is true that inflation may continue so too may housing-price inflation, leading to an increase in allowable premiums and charges. And it is also true that automation can be expected to continue, creating additional opportunities for companies to save costs. There is no reason to think that general inflation will be greater than housing inflation and cost-saving opportunities.
It should be kept in mind that the interim maxima should be in effect for long and may not go into effect at all. By mid-2009, the statistical plan should have yielded sufficient information to permit the permanent cost-based rate-regulation system to go into effect and precluding the interim rates from going into effect. It is also important that the Commissioner has amended the regulations to reduce the reductions required by the interim rates if inflation outstrips housing-price increases.

E.7 Common Comments:

Escrow is a bargain in California, compared to the rest of the U.S. The same escrow transaction in CA for $500 would cost more than $1000 in New York/New Jersey.

Response:

The Commissioner rejects this comment. The test for whether California charges are reasonable is comparison to the reasonable costs of providing the service, not to prices in other jurisdictions.

In fact, many of the findings of an absence of competition made by the Commissioner for California have been mirrored by studies (cited in the Competition Report) applicable to other jurisdictions. It would not be surprising to find that reverse-competition and excessive rates are a national problem (as suggested by the report of the State of Washington's Insurance Commissioner), and it is not inconceivable that over-charges are even greater in other states. That is not a reason to abide excessive charges to California consumers.

E.8 Common Comments:

Escrow is constantly forced to compete for business through reductions in price of escrow fee due to competition. This will force escrow to reduce its fee to an even greater extent that escrow officers can afford.

Response:

The Commissioner rejects this comment. Commenter has offered no evidence of price-competition in escrow and no evidence that the cost of escrow has been declining.

E.9 Common Comments:

In an average transaction, escrow is one of the lowest costs.

Response:

The Commissioner rejects this comment. It is true, for example, that escrow costs less than the house being purchased, and the escrow fees may in fact be less than brokerage and loan fees, but that is irrelevant to the question whether the escrow charge is excessive. The reasonableness of escrow charges is determined by reference to the reasonable costs of providing escrow service, not by the charges for other services.

E.10 Common Comments:

Escrow agents provide a service based on trust, integrity and fair dealing.

Response:

The Commissioner rejects this comment. Commenter has offered no evidence to support this assertion and no basis for crediting it in considering adoption of the regulations. Furthermore, this comment is not specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action, so no response is necessary. (Gov. Code, § 11346.9, subd. (a)(3).)

E.11 Common Comments:

Escrow fees are justified and submitted for approval by the Insurance Commissioner.

Response:

The Commissioner rejects this comment. The inadequacies of existing regulation precludes any inference of reasonableness from the absence of action by the Commissioner on past rate-filings. These regulations are intended to correct those inadequacies and make possible the finding of excessiveness when excessive rates are filed.

E.12 Common Comments:

Increased responsibilities have been thrust upon escrow companies by lenders, real estate agents and the government. This is due to competition with other escrow services which agree to take on these responsibilities. Examples include FIRPTA, CAFIRPTA, 1099 and ordering natural hazard disclosures that real estate agents are forcing escrow to handle, and receiving loan documents to process and obtain buyers' signatures, signing loan documents on behalf of the lender, paying bills on behalf of the client, despite fact that lender has not explained documents to consumer.

Due to competition with other carriers for business, escrow agents have been forced to accept additional responsibilities. These responsibilities include ensuring collection/remission of funds to the Franchise Tax Bd. The Employment Development Dept., the IRS, the County Tax Collectors, Child Support Services, County Lien Departments, Irrigation Districts, Homeowners Associations, County Recorders offices and Assessors Offices, among others. Hence, escrow officers do a lot of work for their pay.

Response:

The Commissioner rejects this comment. The implication of this comment, if credited, is that escrows have been forced to subsidize other actors in the real-estate transaction by providing free services to them. That is further evidence of reverse-competition. The solution is not to require escrow companies to continue to provide free services but to recognize in the rates of the appropriate company the costs of performing its services. Furthermore, to the extent escrows have had to assume additional responsibilities, the cost of providing those services will be reflected in the companies' costs, which will determine the maximum permitted charge.

E.13 Common Comments:

Escrow agents' fees represent approximately 1/10th of 1 percent of the purchase price of the home (another commenter says the fees are approx. ½ of 1% of sales price). Meanwhile the lender, real estate agent and even the County Recorder get more in fees than the escrow agent to handle the transaction. This, despite the fact that the escrow agent handles the lion's share of the workload. Pound for pound, the escrow agent delivers more service per dollar than any other entity in the transaction. These interim-rate reductions will hit escrow the hardest.

Response:

The Commissioner rejects this comment. Escrow fees may in fact be less than brokerage and loan fees, but that is irrelevant to the question whether the escrow charge is excessive. The reasonableness of escrow charges is determined by reference to the reasonable costs of providing escrow service, not by the charges for other services.

E.14 Common Comments:

The regulations will put many single parents and women out of work. Women represent 90% of the escrow workforce.

Response:

The Commissioner rejects this comment. The regulations provide escrow companies with the opportunity to recover in charges the reasonable costs of providing their service plus a reasonable profit. If limitation to reasonable costs and reasonable profit causes some firms to withdraw from the market, that is not a reason not to so limit the charges. The allegation that firms that withdraw from the market, or employees who will not be employed in the industry, include a disproportionate percentage of female employees or single parents is not a reason to allow excessive escrow charges. The Commissioner does not accept the implication that female employees or single parents cannot be productively employed by companies charging reasonable prices.

E.15 Common Comments:

Escrow officers provide services at a much lower charge than in states which use lawyers for such services.

Response:

The Commissioner rejects this comment. Commenter does not provide evidence to support this comment. But even were it supported, it would be irrelevant to adoption of the regulations. The reasonableness of escrow charges is determined by reference to the reasonable costs of providing escrow service, not by the charges for other services.

E.16 Common Comments:

Escrow officers perform functions such as clearing title, obtaining demands, disbursing funds and corresponding with multiple parties to the real estate transaction. Clearing judgments and liens from the government often takes up a lot of an escrow officer's time and effort.

Response:

The Commissioner rejects this comment. The cost of such functions will be reflected in the companies' costs, which are used by the regulations to determine the maximum permitted charge.

E.17 Common Comments:

Other real estate entities are paid according to commission, but the escrow fee is a flat fee based on a percentage of the home price.

Response:

The Commissioner rejects this comment. To the extent the commenter is drawing a distinction in terminology between "commission" and "fee," the distinction has no apparent significance. Both real estate commissions and escrow fees are based on a percentage of the home price, and both have enjoyed sharp increases as home prices have risen. The economic reality is effectively the same, and any difference in nomenclature is no reason not to adopt the regulations.

E.18 Common Comments:

The fees in the escrow industry have not changed much over the last 20 years. Yet, property taxes, documentary transfer stamps and city transfer stamps have increased.

Response:

The Commissioner rejects this comment. It is true that fees as a percentage of home price have not necessarily changed much. But because title and escrow rates are largely a percentage of home prices, the rise in home prices yields a corresponding increase in title and escrow revenue even when the rate itself (i.e., the numerical percentage) has not changed. The purpose of the interim-maximum regulations is to recognize that because housing prices have increased dramatically, title and escrow revenue has risen far faster than costs would justify.

E.19 Common Comments:

My escrow company's profit margin is in the 10-20% range (or some similar range), after taxes. Thus a reduction in escrow fees in the amount considered by the proposed regulations will put us out of business.

Response:

The Commissioner rejects this comment. Such facile calculations are not illuminating absent a showing the commenter has not made, that its costs cannot be reduced and it will not receive offsetting savings. For example, to the extent the company's costs are themselves a percentage of the escrow fee, those costs can be expected to decline proportionately. The high cost structure of the title and escrow industry is not a reason not to regulate but a reason to regulate the charges.

E.20 Common Comments:

Escrow officers must accept more liability in connection with transactions than they have historically accepted.

Response:

The Commissioner rejects this comment. Escrow losses are fully reflected in calculation of maximum charges.

E.21 Common Comments:

Sales representatives of title companies get paid based on the business they bring in and often cut the flat-fee rate paid on the escrow side.

Response:

The Commissioner rejects this comment. That sales personnel are sometimes paid on the basis of the business they bring in (presumably a reference to commission-based compensation), the regulations fully capture those costs. The statement that sales personnel of title companies will cut **the fees paid** for escrow services suggests widespread violations of law by deviating from the filed rate each controlled escrow company is required to charge. So long as the companies charge their filed rates, there should be no opportunity for the kind of cross-subsidy the commenter suggests – of which the commenter has proffered no evidence of it actually happening.

E.22 Common Comments:

- Escrow officers are an important neutral third party to the transaction and oversee distribution of millions of dollars every day.
- Escrow agents provide a service based on trust, integrity and fair dealing.

Response:

The Commissioner rejects this comment. The Commissioner appreciates the value of escrow services and the importance of the services being provided in a fair manner. That does not refute the fact that the charge for these services should not be excessive.
To the extent the commenter is asserting that escrow-providers are "unbiased" and therefore can be trusted to exact only fair charges, the Commissioner rejects the assumption that providers are invariably charging reasonable fees or putting their customers' interests ahead of their own. The proposed regulations will permit escrow companies to charge a reasonable amount while providing the necessary service, but will not allow for excessive charges.

E.23 Common Comments:

We are responsible for accurately clearing title on real property, paying liens and judgments, many of which are to state and federal agencies for child support. We must deal with and answer to real estate agents, lenders, buyers, mortgage brokers, court orders, etc.

Response:

The Commissioner rejects this comment. The cost of such functions will be reflected in the companies' costs, which are used by the regulations to determine the maximum permitted charge.

E.24 Common Comments:

Regulation is not needed for escrow fees at title companies; they are already at the bottom of the food chain and experience downward pressure on escrow fees from within their own company.

Response:

The Commissioner rejects this comment. The Commissioner has found that the title-insurance market lacks a reasonable degree of competition. He also has observed that prices have risen as home prices have risen, without reflection of reduced costs made possible by automation. He therefore rejects this comment as not substantiated and unpersuasive.

E.25 Common Comments:

Regulations & research do not reflect fact that escrow is a cyclical business, and companies are in the midst of layoffs due to the cooling of the real estate business.

Response:

The Commissioner rejects this comment. The regulatory provisions that go into effect once the data from the statistical plan are received recognize the effect of fluctuations in volume and adjust allowable rates accordingly – both up and down.
The interim rates are based on the company's own 2000 rates (which themselves have, in many cases, not changed significantly since even earlier dates). When and if the interim rates go into effect, the provisions of section 2358.9(b) will reflect any downward movement of transaction size. Furthermore, the commenter offers no evidence that current volume is below the volume in 2000, which presumably was deemed by the company adequate to support its 2000 rates.

E.26 Common Comments:

In an average transaction, escrow is one of the lowest costs.

Response:

The Commissioner rejects this comment. Escrow fees may in fact be less than brokerage and loan fees, but that is irrelevant to the question whether the escrow charge is excessive. The reasonableness of escrow charges is determined by reference to the reasonable costs of providing escrow service, not by the charges for other services.

E.27 Common Comments:

Independent escrow companies will be put out of business if they have to try to compete with the prices forced upon controlled escrow.

Response:

The Commissioner rejects this comment. Commenter has offered no evidence to support the claim that there is, or will be, price-competition in the escrow market. On the contrary, the Commissioner has, based on the evidence, found that there is not a reasonable degree of competition.

Indeed, the comment itself suggests an absence of competition. The comment implies that if controlled escrow companies were to reduce their prices, they could capture a larger market share and eliminate competitors. In a competitive market, where there is such an opportunity, it would be taken. The implication that such price-competition will occur only if regulation drives down the rates for controlled escrow companies confirms the absence of competition and need for regulation.

E.28 Common Comments:

Lenders, mortgage brokers and realtors are making thousands of dollars on each transaction, but escrow officers are forced to do their homework for them without any additional pay.

Response:

The Commissioner rejects this comment. Whether current escrow charges are excessive is not determined by comparison to the profitability of other market segments, which may themselves be afflicted with non-competitive markets and reverse competition. The measure of the reasonableness of escrow charges is measured by comparing those charges to the cost of providing the service. The regulations require that the cost not exceed the reasonable costs of providing the service – largely measured by industry-average costs – plus a reasonable profit. The suggestion that escrow officers are doing the work of others without compensation implies that they are giving fee services as an inducement for business in violation of the anti-rebating laws.

E.29 Common Comments:

Regulations will force escrow companies to use inexperienced staff to handle the transaction without appropriate supervision, thereby creating more errors and problems for homebuyer/seller.

Response:

The Commissioner rejects this comment. The commenter offers no evidence to support the claim that qualified escrow companies providing good service will not be able to operate successfully under the regulations. To the contrary, the regulations require that charges for escrow be permitted to be high enough to recover reasonable charges plus a reasonable profit. The Commissioner rejects the claim that no qualified businesses will be able to function under these conditions.

COMMENTS CONCERNING NOTARIES PUBLIC ("N.1, N.2,…ETC.")

N.1 Common Comments:

- The proposed regulations will restrict the fees of notaries public and will prevent notaries from providing their services in the convenience of customers home.
- Regulations will reduce number of NPs who perform in-home notary services.
- Regulations will increase fraud because notaries will not be as deeply involved in the transactions.
- Regulations will negatively impact notary service customers with special needs.

Response:

The Commissioner rejects this comment. The proposed regulations do not, in any way restrict or regulate notary fees. Indeed, Insurance Code section 12340.7 expressly excludes notary fees from the definition of "rates" and consequently such fees are beyond the scope of the proposed regulations.

COMMENTS CONCERNING UNDERWRITTEN TITLE COMPANIES OR TITLE INSURERS ("T.1, T.2,…ETC.")

T.1: Common Comments:

By greatly reducing the revenues to title companies, the proposed regulations will force many companies out of the business and will leave consumers with less competition and fewer choices.

Response:

The Commissioner rejects this comment. Commenter has not provided any evidence to show that any company will not be able to survive under the proposed regulations. There is no reason why a title insurer, UTC, or controlled escrow company could not successfully operate under these proposed regulations, which are largely built on average industry costs. There is also no reason to believe that, given the finding that there is not a reasonable degree of competition, the presence or absence of some companies will have any effect at all on what consumers pay. On the contrary, it appears that a significant source of higher prices has been the high costs of reverse-competition in the title market. If companies do not have to match the extravagant sales expenses associated with reverse competition, it may well be that more, not fewer, companies will be able to compete on a more level field. Furthermore, to the extent some inefficient participants would withdraw from the market, that is no different from the outcome that would obtain in a competitive market.

T.2 Common Comments:

Title rates are already discounted significantly by short term rates, revamp rates, refinance rates and other special rates such as nonprofit rates.

Response:

The Commissioner rejects this comment. The proposed regulations preserve the ability of companies to employ cost-justified discounts.

T.3 Common Comments:

We have employees to pay, bills to pay. We can't cover those costs under the regulations.

Response:

The Commissioner rejects this comment. The regulations are intended, in general, to yield sufficient revenue to give the company the opportunity to cover its reasonable costs and to earn a fair profit. Costs are generally recognized on the basis of industry-average costs, which clearly provide that opportunity.

Where a company cannot cover its existing payroll or support its current spending on that basis, it suggests that the company may be over-staffed or insufficiently cost-conscious in its expenditures.

The notable departure from industry-average costs is in the area of sales, and it may well be that companies will not be able to support existing costs compensating sales personnel under the current regulation. However, the regulations are premised on the finding of a lack of competition, the presence of reverse-competition, and the effect of reverse-competition of driving up sales and "customer-service" costs. Denying companies the ability to pass such costs through to consumers is purposeful and appropriate.

T.4 Common Comments:

Premium collected for title insurance is a one-time premium collection. It could cover the same homeowner for many years, and there is no annual premium collected, unlike other forms of insurance.

Response:

The Commissioner rejects this comment. The regulations recognize the full tail of the loss distribution, allowing the title company to collect in rates an amount sufficient to cover the full loss distribution.

T.5 Common Comments:

Customers are happy to pay our charges. Otherwise, we couldn't stay in business. So the Commissioner has no right to try to drive down those charges.

Response:

The Commissioner rejects this comment. The fact that customers pay the charges for a product they are required to purchase is not an indication of customer satisfaction. Commenter has offered no evidence that consumers are happy to pay the charges or would object to lower charges. The products and services being provided are required of the consumer to complete their real-estate transaction.

T.6 Common Comment:

The proposed regulations will cost a fortune to comply with and will drive companies out of business.

Response:

The Commissioner rejects this comment. The Commenter does not provide any evidence to substantiate the claim. Commercial services already exist to provide regulatory reporting compliance at reasonable cost. There is no reason to doubt that such services will become available upon enactment of the regulations.

T.7 Common Comment:

- It may be OK to impose the stat plan on big companies, but it severely disadvantages small companies.
- The statistical plan is too burdensome and will be too costly for licensees, generally.
- The statistical plans in New York, Texas and other states are not nearly as burdensome.

Response:

The Commissioner rejects this comment. The Commissioner has determined that the statistical plan is reasonable and does not conflict with the intent of Insurance Code section 12401. The reporting of details regarding each company's operations is required because the Commissioner has determined that existing reporting is inadequate. Specifically with regard to the statistical plan used in Texas, the Commissioner notes that the Texas Commissioner has found his state's plan to be so inadequate that he has propounded hundreds of interrogatories to companies to fill the gaps in the data. The reporting of certain data at the policy level is neither unreasonable nor burdensome; requiring the same data to be reported at an aggregate level would require the company to collect the data at the policy level, and by requiring the reporting at that level the Commissioner is able to verify accuracy and more fully analyze the data.

The one-time costs of compliance with the proposed regulations must be measured against the magnitude of consumer charges – in excess of $4 billion – and against the apparent extent to which rates and charges are excessive. It appears from the interim-maximum calculations that the effects of housing inflation and the absence of price-competition have allowed the companies to collect hundreds of millions of dollars a year in excess of the amounts they would have collected for the same business in 2000, adjusted for the companies' increased costs – and that does not take into account the extent to which those 2000 rate were themselves excessive.

The concern about small companies has led the Commissioner to amend the proposed regulations to exempt them from the statistical plan until software or services are commercially available. In all other respects, the commenter has failed to proffer any evidence of any impairment of competition.

T.8 Common Comment:

Fees have not changed much since 1973 (or some similar date). There was a gentle increase in 1998 and a voluntary reduction of fees in 2/3/06 (or similar date) to be competitive with other insurers.

Response:

The Commissioner rejects this comment. It is true that rates as a percentage of home prices have not necessarily changed much. But because title and escrow rates are largely a percentage of home prices, the rise in home prices yields a corresponding increase in title and escrow revenue even when the rate itself (i.e., the numerical percentage) has not changed. The purpose of the interim-maximum regulations is to recognize that because housing prices have increased dramatically, title and escrow revenue has risen far faster than costs would justify.

T.9 Common Comment:

The title fees in a transaction are much smaller than other fees charged by other entities involved in the real estate transaction, such as lenders, real estate commissions, etc.

Response:

The Commissioner rejects this comment. Whether current title premiums are excessive is not determined by comparison to the profitability of other market segments, which may themselves be afflicted with non-competitive markets and reverse competition. The measure of the reasonableness of title charges is measured by comparing those charges to the cost of providing the service. The regulations require that the cost not exceed the reasonable costs of providing the service – largely measured by industry-average costs – plus a reasonable profit.

T.10 Common Comment:

There has been a decrease in rates since 1998. In 1998, a title fee for a 500,000 was $1187; today it is $1150.

Response:

The Commissioner rejects this comment. Title premium per dollar of home value is not a valid measure of the reasonableness of title rates. The measure of an excessive rate is whether the rate is higher than necessary to cover the reasonable costs of providing the service plus a fair profit. Neither the costs nor the profit is closely related to home value. Rather, they are related to transactional costs such as searching and document-preparation, and those costs are insensitive to home value – and should, in recent years, have declined in response to increased automation.

T.11 Common Comment:

Title insurers have done things to try to reduce costs, creating new products that are more affordable. The real culprit is inflated home prices.

Response:

The Commissioner agrees with the comment that higher title and escrow charges have been caused by sharply higher home prices. That supports the regulations' finding that current rates are excessive and that rates should be reduced sufficiently to remove the effects of housing-cost inflation in excess of the increase in the cost of providing title and escrow.

T.12 Common Comment:

We can't cover the reductions, due in part to the fact that sales in the market are slowing.

Response:

The Commissioner rejects this comment. The market may be slowing relative to 2005 levels. There is no reason to believe market activity or prices are lower than the 2000 levels on which the interim maxima are based.

T.13 Common Comment:

My company is already in the process of laying off personnel. The proposed regulations would require me to reduce my rates, which can only result in more layoffs.

Response:

The Commissioner rejects this comment. If companies are already laying off employees, it indicates that employment-level already varies as a function of revenue and that lower revenue will not cause any effects to which the industry is unaccustomed.
Ultimately, the Commissioner has no authority to allow otherwise excessive rates on the ground that rates must be excessive in order to maintain current employment levels.

T.14 Common Comment:

The interim-rate reduction is based on a very short experience period (from 2000-2005). This is not a representative period of time for the title insurance industry. The Commissioner should be looking, instead, at a much longer period of time.

Response:

The Commissioner rejects this comment. The fact is that there has been very little change in the rates companies have filed over long periods. The 2000 rates were not filed on the basis of the 2000-2005 experience, which was, of course, unknown at the time. The 2000 rates reflected the companies' experience in the years leading to 2000 and was deemed by the companies to be adequate.

T.15 Common Comment:

My company must charge a larger amount during slow sales years in order to cover our expenses during leaner years.

Response:

The Commissioner rejects this comment. Companies should be adjusting their rates to cover their expected costs. The solution to bad years is not to charge excessive rates in good years but to reduce operating costs in lean years.

T.16 Common Comment:

The fact that title insurer losses are small does not mean rates are excessive. There are many costs other than rates that must be covered, such as title-plant and search costs.

Response:

The Commissioner rejects this comment. While the extremely low loss-ratio in title is not conclusive evidence of excessiveness, vague allusions to other costs are not evidence of reasonableness. The regulations expressly provide for the expected losses, based on industry experience. The regulations also provide for the reasonable cost of all of the other functions. So the commenter's defense of the industry's low loss-ratio is irrelevant to the regulations.

T.17 Common Comment:

Losses may take many years to materialize. Companies have to carry statutory reserves for many years.

Response:

The Commissioner rejects this comment. The regulations contain an allowance for losses, based on industry experience, including losses that may materialize in future years. The regulations' calculations provide for both paid and incurred losses, including reserves and including reserves for claims that have not yet been reported but are expected.

T.18 Common Comment:

- By regulating on the basis of average costs, the maximum permitted rate will be dominated by the costs of large companies that enjoy economies of scale. Small companies cannot match those economies, so they will be forced to charge less than their costs.
- There is no justification for setting the maximum rate at the industry average. There is no analysis provided in the regulations to demonstrate that rates above the industry average are unreasonable.

Response:

The Commissioner rejects this comment. The commenter has not provided any evidence that the differences in size among title companies actually produce material differences in costs per unit. However, to the extent there may be such differences, the law is clear that regulation on the basis of average costs is lawful and reasonable and that there is no right to recover the costs of a given company's method of business. The justification for using average costs is that, in general, the reasonable cost of a task involved in provision of the service is no greater than the average cost actually experienced by the industry providing that service. Regulation by formula based on industry-average costs has long been practiced by regulatory agencies and approved by the courts. (See, e.g., *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216.)

T.19 Common Comment:

A conclusive determination of excessiveness on the basis of industry data, without consideration of the company's individual costs, is not actuarially sound.

Response:

The Commissioner rejects this assertion as inconsistent with prevailing law on rate-regulation, which permits regulation by formulas, taking into consideration the industry's average costs.

T.20 Common Comment:

Companies have no way to recover the costs of preliminary reports that are not used to produce a title policy, yet the regulations implicitly assume that those costs will be recovered. That fiction makes the regulations confiscatory.

Response:

The Commissioner rejects this comment. Insurance Code section 12404.1 requires the company to bill and to make a good faith effort to collect the preliminary-report charge. The regulation simply reflects the clear implication of the statute that if the company waives the charge it is voluntarily foregoing the revenue. If that results in an under-collection, that is a consequence entirely of the company's choice.

T.21 Common Comment:

The profit factor is not a true ROE because it is not calculated on the basis of the insurer's market capital but rather on the basis of its book capital. That is not economically valid.

Response:

The Commissioner rejects this comment. Use of market-capital to determine profit is circular, since the higher the recognized capital the higher the return and the greater the market value of the investment. Furthermore, in the long run book value and market value tend to converge. And, in fact, the courts have consistently rejected the claim that a regulated entity is entitled to market-based returns. (E.g., *Permian Basin Area Rate Cases* (1968) 390 U.S. 747, 769; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 320-321; cf. *id.* at 301-302 [authorizing use of statutory capital rather than GAAP capital].)

T.22 Common Comment:

The risk-free rate plus 3¾% risk premium is too low.

Response:

The Commissioner accepts this comment to the extent that he has raised the rate of return from 3¾% to 6%. The risk premium is derived from historical data based on the returns of property-casualty insurers. Reliance on those firms, rather than on title insurers, is necessary because the Commissioner has found that the title markets are not reasonably competitive, rendering their performance an inadequate measure of a fair return in a competitive market. Property-casualty insurers are a reasonable proxy for title insurers operating in a reasonably competitive market.
The basis of the 6% premium is further explained in the Staff Report on Profit in the rulemaking file.

T.23 Common Comment:

Our actual costs for sales and customer service is far more than 15% of premium. This section is clearly confiscatory.

Response:

The Commissioner rejects this comment. The 15% figure comes from the experience of insurers writing in markets not afflicted with reverse-competition. The high commission rates and other sales costs associated with title insurance are the effects of reverse-competition. There is nothing improper about denying companies the costs associated with reverse-competition.

T.24 Common Comment:

The Commissioner may think our sales costs are too high, but we have legally binding contracts to pay those commissions. Therefore, they cannot be excluded from our lawful, reasonable costs.

Response:

The Commissioner rejects this comment. As a legal matter, a company may not, by entering a contract to pay excessive charges, confer upon itself immunity from rate-regulation or an entitlement to charge excessive rates.
As a practical matter, a company can be expected to renegotiate contracts that require it to pay excessive commissions or to contract with others to provide the services. The fact that the maximum rate regulation does not take effect until 2009 gives the companies plenty of time to align their costs with the maximum authorized rates.

T.25 Common Comment:

The relativities proposed in the regulations are different from the ones that are used by my company.

Response:

The Commissioner rejects this comment. The regulations determine allowable costs and charges on the basis of industry-representative data. The relativities appearing in the regulations were derived from a comparison of relativities filed by companies. Furthermore, relativities are expected to be on-balance – that their collective effect should be neutral on revenues. So to the extent that a company uses a higher relativity for, say, a specific endorsement, it will be using a lower relativity for some other endorsement. The differences should have little or no effect on total revenues.
It should be remembered, no company is required to employ the regulatory relativities, nor is any company prohibited from employing different relativities. The relativities are merely inputs to the calculation of the regulatory maxima.

T.26 Common Comment:

The regulations calculate all relativities as a percentage of premium. We use fixed dollar amounts.

Response:

The Commissioner rejects this comment. Each company is free to use whatever relativity it wishes, calculated as a fixed-dollar amount or percentage.
Most insurers use percentages for most endorsements, making it appropriate for the proposed regulations to use percentages to calculate the maximum permitted charge.

T.27 Common Comment:

Fixed dollar relativities are more appropriate for many endorsements because the cost of issuing the endorsement is not a function of premium.

Response:

The Commissioner rejects this comment. The fact that various companies differ in calculating the charge for certain endorsements as either a percentage or a flat dollar amount is itself an indication that either choice is, to some extent, arbitrary.
The percentages appearing in the regulations will, overall, yield approximately the same amount as the corresponding fixed charges. And since the relativities are not themselves caps but rather inputs to the formulas, the overall amount is more relevant than the individual case.

T.28 Common Comment:

The Commissioner doesn’t understand our industry.

Response:

This comment is not specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action, so no response is necessary. (Gov. Code, § 11346.9, subd. (a)(3).)

COMMENTS CONCERNING MISCELLANEOUS MATTERS ("X.1, X.2,…ETC.")

X.1 Common Comments:

By assuming all companies are the same, the regulations give an advantage to the large companies that enjoy economies of scale, disadvantaging and eventually driving out of the market the smaller companies that provide competition through product innovation.

Response:

The Commissioner rejects this comment. Commenter has offered no evidence that small companies will be relatively disadvantaged by the proposed regulations. There is no reason to believe that small, reasonably efficient companies will be unable to compete. To the extent there are economies of scale, they represent advantages large companies would enjoy in a competitive market. It is not the purpose or effect of the regulations to give to, or take away from, large or small companies any advantage they might have in a competitive market.

X.2 Common Comments:

The regulations assume one size fits all; one formula can fairly set the rate for many different companies. Each company is an individual, with its own costs, customers, and system of doing business. It is simply unfair and inappropriate not to recognize the unique qualities of each company.

Response:

The Commissioner rejects this comment. Regulation by formula based on industry-average costs has long been practiced by regulatory agencies and approved by the courts. Such a regulatory approach, including the use of formulas, was approved for property-casualty insurance under Proposition 103 was approved in *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216. There is no material difference between the statutes in their definition of what constitutes an excessive rate.

Furthermore, there is nothing unfair about regulating on the basis of average-costs. Where, as in the title and escrow markets, there is an absence of price-competition to discipline the market and to drive down costs, average observed costs are, if anything, above the reasonable costs that would occur in a competitive market and are themselves excessive. No company can fairly claim that its costs should be above the industry-average in such a market.

X.3 Common Comments:

Each company is exquisitely unique and cannot possibly be dealt with on a one-size-fits-all basis.

Response:

The Commissioner rejects this comment. The regulatory task is to identify the reasonable costs of providing the product or service. The industry-average observed costs are a reasonable basis for determining how much a company ought to spend for a given function.

X.4 Common Comments:

The regulations should also protect against inadequate rates.

Response:

The Commissioner rejects this comment. The Commissioner recognizes the requirement that rates not be inadequate. The regulations are not intended to define the lower bound of an adequate rate. The Commissioner has determined that there is a lesser need for such a regulation at this time, such that any allegation of inadequacy can be assessed on an ad hoc basis in an adjudicatory hearing.

X.5 Common Comments:

The title industry (UTCs, TIs and escrow) has laid off 10-20% of its workforce already

Response:

The Commissioner rejects this comment. To the extent companies are themselves bringing down costs and paring excess staffing and expenses, those actions are salutary and beneficial to the companies. The actions will bring companies that may currently be charging excessive rates that much closer to reasonable rates and to compliance with the regulations.

If companies are already laying off employees, it indicates that employment-level already varies as a function of revenue and that lower revenue will not cause any effects to which the industry is unaccustomed.

X.6 Common Comments:

While it is true that as housing prices increased "the title industry made a little more money," that has all changed now that house prices are decreasing. Now title entities are already seeing reductions similar to those reductions proposed in your interim rate reductions, due to the decrease in housing prices.

Response:

The Commissioner rejects this comment. The interim rate-reduction calculations were based on the rise in prices through September 2006. To the extent there may been a reduction in average prices from 2006 to 2009, that reduction will be recognized in calculation of the maximum interim rates. To the extent dollar-volume of housing sales has fallen, there is no evidence volume is below the 2000 level, so there is no reason to believe companies are unable today to achieve scale economies available to them in 2000, when they voluntarily set their prices at the level on which the interim maximum rates are based.

X.7 Common Comments:

My company's rates have not increased for title or escrow services since February 28 of 2000.

Response:

The Commissioner rejects this comment. It is true that rates as a percentage of home prices have not necessarily changed much. But because title and escrow rates are largely a percentage of home prices, the rise in home prices yields a corresponding increase in title and escrow revenue even when the rate itself (i.e., the numerical percentage) has not changed. The purpose of the maximum interim rates is to recognize that because housing prices have increased dramatically, title and escrow revenue has risen far faster than costs would justify.

X.8 Common Comments:

New personnel who are paid less due to these regulations will not be able to provide the same level of service and this will cause a marked deterioration in the quality of real estate transactions.

Response:

The Commissioner rejects this comment. The commenter offers no evidence that employees paid at levels consistent with the rate-regulations will not be able to provide customers with reasonable service at those rates. The suggestion that any reduction in rates will result in reduced service is unsupported. It is also a claim that has no limiting principle – it can be claimed in defense of every excessive rate.

X.9 Common Comments:

Operating expenses are up. Volume is down, layoffs have already occurred and there will be more.

Response:

The Commissioner rejects this comment. The regulatory provisions that go into effect once the data from the statistical plan are received recognize the effect of fluctuations in volume and adjust allowable rates accordingly – both up and down.

The interim rates are based on the company's own 2000 rates (which themselves have, in many cases, not changed significantly since even earlier dates). The commenter offers no evidence that current volume is below the volume in 2000, which presumably were deemed by the company adequate to support its business at 2000 volume.

X.10 Common Comments:

Automation is not free. Software costs are rising, and companies need more money to cover those costs.

Response:

The Commissioner rejects this comment. In a competitive market, only those technological advances that reduce cost will ordinarily be purchased. There is no reason to doubt that the technology being purchased in this industry is lowering the cost of providing the product.

Title search is a good example. No one can reasonably deny that the widespread replacement of hand-searching of titles with computer-searching of digital records has greatly reduced the cost of providing title insurance. The fact that these cost savings have not been accompanied by commensurate price-reductions confirms the absence of price-competition and the need for regulation.

X.11 Common Comments:

"It is outrageous that any business would be required to reduce fees charged to a substantially lower rate than that charged in the year 2000."

Response:

The Commissioner rejects this comment. The interim-maxima provided in the regulations do not require that the amount charged be below the 2000 amount for the same house. On the contrary, it generally requires that the charge not exceed the 2000 charge on the same house, adjusted for inflation and increased loss exposure.

X.12 Common Comments:

As a loan agent, the proposed regulations will harm my business because I will be unable to do business with the reputable title and escrow companies. The quality and speed of service will be adversely affected, and this will affect my customers. Substandard competitors without the necessary qualifications to handle real estate transactions will take away business from better establishments.

Response:

The Commissioner rejects this comment. The commenter offers no evidence to support the claim that qualified escrow companies providing good service will not be able to operate successfully under the regulations. To the contrary, the regulations require that charges for escrow be permitted to be high enough to recover reasonable charges plus a reasonable profit. The Commissioner rejects the claim that no qualified businesses will be able to function under these conditions.

X.13 Common Comments:

If insurance limits are reduced to 2000 levels, the public will respond later as potential purchasers have to increase their down payment to cover the difference between the needed mortgage and the purchase price in order to get a mortgage.

Response:

The Commissioner rejects this comment. This comment suffers from a false assumption: that the regulations will somehow require title insurers to lower their limits to 2000 levels. The market will not tolerate insufficient policy limits, and the regulations provide for limits to current property values. The interim-maxima have been calculated to cover increased losses from higher limits.

X.14 Common Comments:

Several years out, there may be a rash of title defaults that result in purchasers being liable for the difference between policy limits and the balance still due on the mortgage. Consumers will not have to look hard to figure out why.

Response:

The Commissioner rejects this comment. Commenter does not explain why there would be a rash of defaults, and no reason is evident. To the extent that this comment is based on the false assumption that the regulations will somehow require title insurers to lower their limits to 2000 levels, the assumption is incorrect. The regulations provide for limits to current property values. The interim-maxima have been calculated to cover increased losses from higher limits.

X.15 Common Comments:

The Commissioner wants to drive out the title industry and leave the function to attorneys, whose charges will be higher.

Response:

The Commissioner rejects this comment as unsupported by any evidence and false.

X.16 Common Comments:

Rather than rate-regulation, the Commissioner should adopt measures to increase consumer awareness and to encourage comparative-shopping.

Response:

The Commissioner rejects this comment. Efforts to increase consumer-awareness and comparison shopping are not inconsistent with rate-regulation. Also, the analysis of competition in title insurance markets indicates a fundamental disparity in market power between consumers and companies that cannot be bridged by "increasing consumer awareness." The nature of the title transaction – the complexity, the unfamiliarity with the product, the distraction of other issues, the pressures of time, and other forces – make it unlikely a public-information program would be effective. The commenter provides no evidence to show that there are means at the Commissioner's disposal to increase consumer-awareness sufficiently to provide sufficient price-competition to discipline the market.

X.17 Common Comment:

Rather than rate-regulation, the Commissioner should more effectively prosecute rebating actions.

Response:

The Commissioner rejects this comment. Prosecution of illegal rebating is important and will continue. But the commenter provides no evidence to show that any feasible anti-rebating program would be effective to prevent reverse-competition and to bring down prices.

X.18 Common Comment:

The fees charged by my company are reasonable.

Response:

The Commissioner rejects this comment. This comment is made without evidentiary support. The Commissioner has found that there is not a reasonable degree of competition, depriving the market of the force that the American economy relies upon to keep prices reasonable. And the Competition Report cites abundant evidence that charges in the industry are not reasonable.

X.19 Common Comment:

- These regulations are an election-year stunt.
- The regulations were proposed only to assist the Commissioner in future elections or to make headlines in the media.
- The Commissioner is biased against the title/escrow industry.

Response:

This comment is not specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action, so no response is necessary. (Gov. Code, § 11346.9, subd. (a)(3).)

X.20 Common Comment:

- Pursuant to Government Code section 11346.8(e) if a member of the public raises a new issue and requests additional time to respond to the new issue before the state agency takes action, the Commissioner must consider granting the request for additional time if granting the request is practical and does not unduly delay action on the regulations. The commenter hereby makes such a request on the following grounds: 1) the regulations violate the constitution, 2) the Legislature prohibits the Commissioner's actions and 3) the Commissioner has not complied with the direction of the Legislature as set forth in Insurance Code section 12401.5.

Response:

The Commissioner rejects this comment. He has fully considered the issues raised by this and other commenters and found them not to require further time or consideration. The commenter's constitutional objections are without merit, there is no attempt to regulate so-called independent escrow companies, and the proposed regulations fully comply with subdivision (b) of Insurance Code section 12401.5.

X.21 Common Comment:

The regulations are ambiguous in that they employ undefined terms.

Response:

The Commissioner rejects this comment. To the extent commenters have specifically identified terms that could logically be interpreted to have more than one meaning, the text of relevant sections has been changed. The following are terms that have meaning generally familiar to those affected and do not require definition: affiliation (see Insurance Code Section 1215); basic full escrow; bulk order; concurrent issue; consultants; contract workers; effective year; entire gross premium; escrow agreement; escrow instructions; firm commitment; liaison; management services; maximum liability; other escrow activities; parties; preliminary report production and issuance; production services; recording fee expenses; subdivision; subescrow transactions; title search packages; transaction activity; and typical residential transaction.